



A Joint CENDI/FLICC/FADGI Workshop Series
Issues and Answers in Digitization
Workshop 3 ~ October 7, 2010
Library of Congress, Washington D.C.

Before You Digitize – What Are the Legal Issues?

Digitizing Government Documents: Control Requirements

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Information for the Defense Community **DTIC**[®]



Government Document Management

- What we can share
 - with the public
 - within government
 - within the agency
- Depends on
 - legal limitations
 - policies and regulations
 - intellectual property rights
- Categories (Designation, Markings, Metadata)
 - Public release
 - Classified
 - Controlled Unclassified



Who should be concerned?

- Government agencies
 - Information centers and repositories
 - Libraries
 - Record centers
 - Office collections
- Government outsourced activities
 - Government-Owned, Contractor Operated (GOCO) facilities; i.e., National Labs
 - Federally Funded Research & Development Centers (FFRDC)
 - Industry & academia contractors, grantees, partners
 - Legitimate business relationship
 - Authorized to receive, collect, use, disseminate and store government controlled information



Government Information Management Control & Distribution Authority

- Primary distribution
 - Documents created by your agency
 - Responsible for the content, controls, markings and release decisions.
- Secondary distribution
 - Documents created by others who are responsible for determining primary and secondary distribution.
 - Subsequent uses controlled in accordance with markings specifying authorized recipients or purpose
- Internal use only
 - Controlling office authorizes agency use only.
- Release on a case-by-case
 - Controlling office must review and approve every request for release



Government Information Management Digitization Analysis Factors

- Identification
 - Each item needs review
 - Sort into control category
- Markings
 - More than one may apply; most restrictive trumps
 - Do they exist
 - Are they current
 - Are they correct
- Processing and storing
 - Appropriate-level accredited IT systems
- Dissemination
 - Authentication
 - Authorization



Government Information Management Control Markings and Metadata

- Warn or advise recipients and users of the information of its nature, purpose, origin and conditions for release
- Set conditions for authorized distribution, release, use and disclosure without additional approvals by the originator or controlling office.
- Foster sharing and safeguarding consistent with
 - National security requirements
 - U.S. law
 - Contracts
 - Intellectual Property Rights



Public Information

Title 10 (Energy) CFR § 810.3

1. Available in periodicals, books, or other print or electronic media for distribution to any member of the public, or to a community of persons such as those in a scientific, engineering, or educational discipline or in a particular commercial activity who are interested in a subject matter;
2. Available in public libraries, public reading rooms, public document rooms, public archives, or public data banks, or in university courses;
3. Been presented at an open meeting;
4. Made available internationally without restriction on its further dissemination; or
5. Contained in an application which has been filed with the U.S. Patent Office and eligible for foreign filing under 35 U.S.C. 184 or which has been made available under 5 U.S.C. 552, the Freedom of Information Act. Public information must be available to the public prior to or at the same time as it is transmitted to a foreign recipient.



Public Information Management

One end of the spectrum

- **Public Release**
 - May be made available or sold to the public and foreign nationals, companies, governments, including advisory governments, and may be exported. [DoDD 5230.24 Distribution Statements on Technical Documents]
- **Public Disclosure**
 - Making technical data available without restricting its dissemination or use. [DoDD 5230.25 Withholding Unclassified Information from Public Release]
- **Cleared for Open Publication**
 - May be released without restriction by the originating component or authorized agent. [DoDI 5230.29 Security and Policy Review for Public Release]
- **Public Domain**
 - Information that is published and generally accessible or available to the public . [22 CFR Change 1 and ITAR 120.11]
 - **Careful! This is different from copyright public domain. It does not mean absence of intellectual property protection or describe works of the U.S. Government not subject to U.S. copyright**



Classified Information

The other end of the spectrum

- Executive Order 13526, "Classified National Security Information" December 29 2009
- Executive Agent - National Archives Information Security Oversight Office <http://www.archives.gov/isoo>
- Three levels of classification
 - TOP SECRET: Unauthorized disclosure could cause *exceptionally grave damage* to national security
 - SECRET: Unauthorized disclosure could cause *serious damage* to national security
 - CONFIDENTIAL: Unauthorized disclosure could cause *damage* to national security
- Accredited classified IT systems & networks



Classified Information

Is this still classified?

- No central authority record; consult agency repositories
- 25 year rule is for review
- No automatic declassification or public release
- Agency review options
 - Declassify: No longer causes damage to national security
 - Exempt: Classify beyond 25 years
 - Exclude: Restricted Data/Formerly Restricted Data and information governed by the Atomic Energy Act of 1954
 - Refer to the originator; one agency cannot declassify another agency's information
 - » Multiple authorities
 - » Original controlling office may no longer exist
 - » No subject matter experts available to conduct review



Controlled Unclassified Information (CUI)

The in between

- Unclassified information withheld from public release
 - owned by, produced by or for, or under the control of the executive branch of the United States Government.
 - safeguarding measures or limits on dissemination required by statute, regulation or approved written agency policy
 - where disclosure would compromise legitimate interests, such as privacy, business proprietary information, law enforcement...
- Physical and IT controls
NIST approved cryptographic vendor algorithms
<http://csrc.nist.gov/index.html>
- Executive Agent: National Archives <http://www.archives.gov/cui/>



Controlled Unclassified Information (CUI) Reasons, Mandates, Markings

- Freedom of Information Act (FOIA) Exemption
- FOUO (For Official Use Only)
- Distribution Statements
- Personally Identifiable Information (PII)
- Export Control
- Proprietary legends per FAR/DFARS
- Agency imposed
- © Copyright
- Other



Government Records (44 USC §3301)

- All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics
- Made or received by an agency of the United States Government under federal law or in connection with the transaction of public business
- Preserved or appropriate for preservation...as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.
- Does NOT include library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience



Electronic Government Records

Legal Admissibility under the Rules of Evidence

- Does a born-digital or digitized copy hold the same legality as a paper document with original signature?
- NARA CFR Part 1234 -- Electronic Records Management
<http://www.archives.gov/about/regulations/part-1234.html>
§1234.26 Judicial use of electronic records
Electronic records may be admitted in evidence to Federal courts for use in court proceedings (Federal Rules of Evidence 803(8)) if trustworthiness is established by thoroughly documenting the recordkeeping system's operation and the controls imposed upon it
- Admissibility in Federal Court of Electronic Copies of Personnel Records. May 2008. Department of Justice Opinion of Office of Legal Counsel for Office of Personnel Management.
www.justice.gov/olc/2008/electronic-personnel-records.pdf



Electronic Government Records

Legal Admissibility under the Rules of Evidence

- Guideline for Federal Records Managers or Custodians. U.S. Dept of Justice, Justice Management Division, Systems Policy Staff, Oct. 1990. <http://www.lectlaw.com/files/crf03.htm>
-
- Destroying Paper after Imaging Best Practices." Recommendations subject to legal discovery and legal admissibility in a court of law. www.blackburnconsultinginc.com/DestroyingPaperafterImaging.pdf
- The Uniform Photographic Copies of Business and Public Records as Evidence Act
- Electronic Signature in Global and National Commerce Act (E-Sign)
- Uniform Electronic Transactions Act (UETA) (2000)
- Federal Rules of Civil Procedure (2006)



Controlled Unclassified Information

Freedom of Information Act (FOIA)

Nine Exemptions

1. Classified national defense and foreign relations information.
2. Internal agency personnel rules and practices.
3. Information prohibited from disclosure by federal law.
4. Trade secrets and commercial or financial information that is privileged or business confidential.
5. Inter- or intra-agency memos or letters protected by legal privileges.
6. Personnel, medical, financial, and similar files that if disclosed would constitute a clearly "unwarranted invasion of personal privacy."
7. Certain information compiled for law enforcement purposes.
8. Records for regulation or supervision of financial institutions.
9. Geological and geophysical information and data, including maps, concerning wells.

Department of Justice http://www.justice.gov/oip/04_7.html



Controlled Unclassified Information For Official Use Only (FOUO)

- Applies to Unclassified information
 - May be exempt from mandatory release to the public under the Freedom of Information Act (FOIA)
 - Not cleared for public release
 - Working papers, predecisional drafts
- Access and Distribution
 - Agency policies vary
 - Authorized use within the Agency and between its officials, contractors, consultants, grantees and partners in the conduct of official business



Controlled Unclassified Information Distribution Statements

- Guide to Distribution Limitation Markings of CENDI Agencies: NASA, DOE, DoD (CENDI/07-3) (Updated February 2009)
http://www.cendi.gov/publications/07-3dist_lim_markings_2009.html
- DoDD 5230.24 Distribution Statements on Technical Documents
- Format: Distribution authorized to (*Audience*); (*Reason*); (*Date of Determination*). Other requests for this document shall be referred to (*Controlling Office*)
 - Four (4) components
 - Audience (7 categories)
 - Reason for limitation (10 choices)
 - Date of determination
 - Controlling Office



Controlled Unclassified Information Personally Identifiable Information (PII)

- White House Office of Management & Budget: Information Policy Privacy Guidance
http://www.whitehouse.gov/omb/inforeg_infopoltech#pg
- PII can be used alone to distinguish or trace an individual's identity or when combined with other personal or identifying information linked or linkable to a specific individual, e.g., * Name *Social security number *Biometric records *Date and place of birth *Etc
- Privacy Impact Assessment (PIA) required
 - Ensure handling conforms to applicable legal, regulatory, and policy requirements regarding privacy,
 - Determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and
 - Examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks.



Controlled Unclassified Information

Personally Identifiable Information (PII)

Sensitivity Levels

- Job-related contact information
- Personal contact information
- Personnel files
- Professional biography
- Government credit card activity
- Confidential Financial Disclosure Report
- Personal medical information
- Human subject testing
- Legacy information – Redact or not?



Controlled Unclassified Information Personally Identifiable Information (PII)

Native American Tribal-Agency Confidentiality

Burial and Sacred Sites

“Unwarranted invasion of personal privacy”

USAF v. Rose (425 US, 2152, 370-376, 1976)

- DoD Native American Lands Environmental Mitigation Program (NALEMP) <https://www.denix.osd.mil/portal/page/portal/NA/Policy>
- Executive Order 13007 Indian Sacred Sites
<http://www.ibsgwatch.imagedjinn.com/learn/13007.htm>
- Federal Laws and Acts Protecting Burial Sites
http://www.portal.state.pa.us/portal/server.pt/community/federal_laws_and_acts_protecting_burial_sites/1876
- Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?
by E Plaut <http://www.boalt.org/elq/documents/elq36-1-03-plaut-2009-0420.pdf>





Controlled Unclassified Information Export Control

- Authority
 - International Traffic in Arms Regulations (ITAR) (22 C.F.R. Parts 120-130), Department of State www.pmddtc.state.gov
 - Export Administration Regulations (15 C.F.R. 300 et seq.) Department of Commerce www.bis.doc.gov
- Access and Distribution
 - Only U.S. Persons, i.e. citizens and permanent resident aliens
 - Non-Government entities and persons must certify eligibility
 - Release to foreign entities contingent on export license
- Criminal liability and penalties
 - Fine and imprisonment



Controlled Unclassified Information Export Control Warning

- Export Control Warning **must** appear on analog and digital “covers”
 - “WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751, et. seq.) or the Export Administration Act of 1979, asamended, Title 50, U.S.C., App. 2401 et. seq. Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DoD Directive 5230.25.”
- When it is technically infeasible to use the entire statement, an abbreviated marking may be used, and a copy of the full statement added to the “Notice To Accompany Release of Export-Controlled Data” required by DoD Directive 5230.25 (reference (c)).



Controlled Unclassified Information Proprietary Information

- Catch-all phrase with no precise definition in the law.
- Refers to information that is owned by someone.
- The owner has a proprietary right, i.e., a legal property right, in the information giving a competitive edge by excluding others from using, selling, reproducing, displaying or distributing the information
- The term encompasses, among other things
 - trade secret data
 - commercial or financial information
 - limited rights data and restricted computer software
 - contractor bid or proposals
 - source selection information
 - invention disclosures, and
 - technical data, drawings, designs, specifications and know-how.



Controlled Unclassified Information

Proprietary Information

Contract Government Data Rights

- Contractor owns the intellectual property
- Government gets a license
 - License determines what the government may do with the work
 - Dictates uses and distribution inside and outside government
 - Applies to both the physical item and its intellectual content
- Data Rights clauses
 - Federal Acquisitions Regulation (FAR)
FAR 52.227-14 through FAR 52.227-19
 - Defense Federal Acquisitions Regulation Supplement (DFARS)
DFARS 252.227-7013 through DFARS 252.227-7022
- Licenses
 - Unlimited
 - Government purpose
 - Limited
 - Restricted
 - Small Business Innovation Research
 - Specifically negotiated
 - Special Works



Controlled Unclassified Information

Proprietary Information

Contract Government Data Rights

- Government Purpose
 - Any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations.
 - Government purposes include competitive procurement, but not commercial activities.
- Government Purpose Rights
 - Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and
 - Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.
 - Becomes unlimited rights after 5 years



Controlled Unclassified Information

Proprietary Information

Contract Government Data Rights

- Unlimited Rights

The Government is granted for itself and others acting on its behalf a paid-up, nonexclusive, irrevocable worldwide license in the work to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government for any purpose.

- Government essentially has same rights as the owner
 - Includes the right to distribute to the public
- Default license when data delivered to the government is unmarked



Controlled Unclassified Information

Proprietary Information

Contract Government Data Rights

- Special Works clause requires the contractor to transfer intellectual property developed under contract to the government.
 - DFARS 252.227-7020, Special Works
 - FAR 52.227-17, Rights in Data—Special Works
- Types of information, but not limited to:
 - Audiovisual works; motion picture scripts; musical compositions; sound tracks; translations; adaptations;
 - Histories of agencies, departments, services, or units; surveys of government establishments; and
 - Instruction, guidance, or training materials for government officers and employees in the performance of their official duties.
 - Computer programs and source code



Controlled Unclassified Information

Proprietary Information

Contract Government Data Rights

- “Special work” clause assigns IP rights to the Government
- The Government owns/retains the copyright.
- DFARS 252.227-7020, Special Works: License & Notice

<http://www.acq.osd.mil/dpap/dars/dfars/html/current/252227.htm#252.227-7020>

When a work is first produced, created, or generated under this contract, and such work is required to be delivered under this contract, the Contractor shall assign copyright in those works to the Government. The Contractor, unless directed to the contrary by the Contracting Officer, shall place the following notice on such works:

“© (Year date of delivery) United States Government, as represented by the Secretary of (department). All rights reserved.”



Contract Controls

Government Data Rights Licenses

Intellectual Property: Navigating Through Commercial Waters

[<http://www.acq.osd.mil/dpap/docs/intelprop.pdf>]

Table 2-2. Rights¹ in Noncommercial Computer Software (CS) and Technical Data (TD) Covering Noncommercial Items

Rights Category ²	Applicable to TD or CS?	Criteria for Applying Rights Category	Permitted Uses within Government	Permitted Uses outside Government ³
Unlimited Rights (UR)	Both TD and CS	Development exclusively at Government expense; ⁴ also any deliverable of certain types—regardless of funding. ⁵	Unlimited; no restrictions.	
Government Purpose Rights (GPR)	Both TD and CS	Development with mixed funding. ⁴	Unlimited; no restrictions.	Only for "Government purposes"; no commercial use.
Limited Rights (LR)	TD only	Development exclusively at private expense.	Unlimited, except may not be used for manufacture	Emergency repair/overhaul; evaluation by foreign government.
Restricted Rights (RR)	CS only	Development ¹ exclusively at private expense.	Only one computer at a time; minimum backup copies; modification.	Emergency repair/overhaul; certain service/maintenance contracts.
Prior Government Rights	Both TD and CS	Whenever Government has previously acquired rights in the deliverable TD/CS	Same as under the previous contract.	
Specifically Negotiated License Rights (SNLR)	Both TD and CS	Mutual agreement of the parties; use whenever the standard rights categories do not meet both parties' needs	As negotiated by the parties; however, must not be less than LR in TD, and must not be less than RR in CS. ⁶	

Notes:

1. **Critical Need to Specify Deliverables.** The standard clauses address rights but do not include delivery requirements. The contract must explicitly specify the content, format, and delivery medium for all IP deliverables that are necessary to meet DoD's needs. For TD, it is necessary to specify the level of detail and requirements for delivery in preferred electronic/digital formats. For CS, it is critical to specify requirements for both the executable code and the source code.

2. **Mandatory Listing Requirements.** All TD and CS to be delivered with less than UR must be identified in a list attached to the contract. Pre-award listing requirements are specified at DFARS 252.227-7017; post-award requirements are at DFARS 252.227-7013(e) and -7014(e).

3. **Release Procedures/Restrictions.** All authorized third-party recipients of TD/CS with other than UR must either sign the standard NDA from DFARS 227-7103-7 or receive the TD/CS under a contract containing DFARS 252.227-7025. Additional notice requirements exist for releases of LR data or RR software.

4. **Source of Development Funding—at the "lowest practicable level."** For TD, the determination is based on the funding for the development of the item, component, or process.



Agency Internal Controls

External Publications

Article & Conference Preprints

- Preprint: Author's manuscript after agency review and public release approval but prior to peer-review
 - *Publisher Ingelfinger rule*
Publisher policy instituted in 1969 by Franz J. Ingelfinger, New England Journal of Medicine editor, to protect from publishing material that has lost its originality through prior publication.
 - *Agency-imposed pending peer-review*
National Institutes of Health Public Access Policy
 - *Agency-imposed Scientific, Technical & Medical Patent Filing*
Any public use or sale in the United States or publication of the invention anywhere in the world more than one year prior to the filing of a patent application on that invention will prohibit the granting of an U. S. patent on it. Foreign patent may be much more restrictive than U.S. laws.



Technical Report Example

AFRL [REDACTED]



SOFTWARE PROTECTION DURING DEVELOPMENT

Azad M. Madni

Intelligent Systems Technology, Inc.
3250 Ocean Park Blvd, Suite 100
Santa Monica, CA 90405

January 2004

Final Report for 29 July 2003 – 29 January 2004

This is a Small Business Innovation Research (SBIR) Phase I Report

Distribution authorized to DoD components only; Proprietary Information, Critical Technology; January 2004. Other requests for this document shall be referred to AFRL/SNT, WPAFB, OH 45433-7320.

WARNING – This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, USC, Sec 2751, et seq.) or the Export Administration Act of 1979, as amended, (Title 50, USC, App 2401, et seq.). Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with the provisions of DoD Directive 5230.25. (Include this statement with any reproduced portions.)

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Scan October 7, 2010

- Are there any controls?
- Are they in force?
- What category is this?



Technical Report Example

CUI Markings

AFRL [REDACTED]



SOFTWARE PROTECTION DURING DEVELOPMENT

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 - SBIR protection expires Feb 2009
- Export control warning
 - In effect until changed by originator
- Distribution statement
 - In effect until changed by originator
- Copyright ©
 - Unpublished work expires 01 Jan 2130 (2004 + 125 yrs)
- Government data rights
 - © Unlimited, paid-up, nonexclusive, irrevocable worldwide license



Control Checklist

Identification & Markings Analysis

- Document originator? ☐ Your agency ☐ Other agency
 - Originating agency controls primary & secondary distribution and public release decisions
- Classified? ☐ Yes ☐ No
 - Declassified? Public Release Review?
- Controlled Unclassified? Markings, legends, warnings?
 - For Official Use Only (FOUO)
 - Freedom of Information Act (FOIA) Exempt
 - Personal Identifying Information (PII)
 - Export Control
 - FAR/DFARS Data Rights
 - Proprietary, competition sensitive, contractor evaluation
 - Premature dissemination
 - Other
- Public Release?
 - Publicly available now?
 - Copyright? Work of the US Government ? Copyrighted?
 - Government Data Rights?
 - Other permission or license rights? GNU, Creative Commons, Negotiated...



Government Information Management

Partial List of Legal Controls

- OMB-A130 Management of Federal Information Resources
Freedom of Information Act of 1966, as Amended (5 USC 552)
- Homeland Security Act of 2002 (Public Law 107-296, 116 Stat. 2135)
- Health Insurance Portability and Accountability Act (HIPAA) Security Regulations 45 CFR Parts 160, 162, and 164
- Family Educational Government Rights and Privacy Act (FERPA) Regulations CFR Part 99
- Foreign Assistance Act of 1961, as amended
- Privacy Act of 1974
- Computer Security Act of 1987
- Trade Secrets Act
- Federal Managers Financial Integrity Act of 1982
- Federal Information Security Management Act (FISMA) of 2002



[Home](#) > CENDI Home Page

Welcome to the CENDI web site

CENDI's vision is to provide its member federal STI agencies a cooperative enterprise where capabilities are shared and challenges are faced together so that the sum of accomplishments is greater than each individual agency can achieve on its own.

CENDI's mission is to help improve the productivity of federal science- and technology-based programs through effective scientific, technical, and related information-support systems. In fulfilling its mission, CENDI agencies play an important role in addressing science- and technology-based national priorities and strengthening U.S. competitiveness.

CENDI is an interagency working group of senior scientific and technical information (STI) managers from [14 U.S. federal agencies](#):

- Defense Technical Information Center (Department of Defense)
- Office of Research and Development & Office of Environmental Information (Environmental Protection Agency)
- Government Printing Office
- Library of Congress
- NASA Scientific and Technical Information Program
- National Agricultural Library (Department of Agriculture)
- National Archives and Records Administration
- National Library of Education (Department of Education)
- National Library of Medicine (Department of Health and Human Services)
- National Science Foundation
- National Technical Information Service (Department of Commerce)
- National Transportation Library (Department of Transportation)
- Office of Scientific and Technical Information (Department of Energy)
- USGS/Biological Resources Discipline (Department of Interior)

These programs represent over 97% of the federal research and development budget.

The CENDI web site is hosted by the Defense Technical Information Center (DTIC), and is maintained by the [CENDI secretariat](#).

www.cendi.gov

What's New

[Workshop 2: Evaluating Digitization and Digitization Equipment](#)

- Issues and Answers in Digitization Workshop Series sponsored by CENDI, FLICC and FADGI October 7, 2010, presentation is now available online.

[Workshop 3: Before You Digitize - What Are the Legal Issues?](#)

- Issues and Answers in Digitization Workshop Series sponsored by CENDI, FLICC and FADGI October 7, 2010, Library of Congress, Washington, DC. Registration is now open.

Open Source Software and Copyright: Legal and Business Considerations for Government Use - sponsored by CENDI, the Law Library of Congress, and the Federal Library and Information Center Committee July 26

[Agenda and Presentations](#)

IWGGD/CENDI/EPA Scientific Data Management Workshop - sponsored by IWGGD/CENDI/EPA June 29-July 1

[Agenda and presentations](#). Additional presentations to be posted as available.

CENDI-NFAIS Upcoming Workshop: Mobile Computing: Delivering Content to the Research Community

NARA Nov 18. [Details...](#)



CENDI Copyright Working Group

Co-Chair

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